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No. 85-1708

IN THE

Supreme Court of the United States

October Term, 1985

STATE OF CALIFORNIA, ET AL.,
Appellants,

v.

CABAZON BAND OF MISSION INDIANS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE STATE OF MINNESOTA IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

Minnesota, like many states, has a significant amount of Indian country within its borders. Eleven major reservations, comprising approximately 2.5 million acres of land and water, are found in the state. On most of these reservations, Indian bands operate gaming facilities which violate state law. Although bingo games and pull-tabs are the predominant methods of gambling within reservations, there are an in-

creasing number of questions arising concerning other forms of gambling. These other forms include betting on video-display gambling games, pari-mutuel betting on televised horse or other types of racing, and the playing of casino-variations of bingo such as "bingo-jack" or "bingo-roulette."

As long as the rules governing the jurisdiction over gambling in Indian country remain in their confused state, Minnesota will face an ever-increasing number of attempts to create large gambling havens on Indian land within its borders. An increased level of litigation is inevitable. Potential spill-over effects of large unregulated gambling operations to non-reservation territory are obvious. The concern over these problems is one reason for the filing of this *amicus* brief.

There is another reason, however, which leads Minnesota to approach the Court with a separate *amicus* brief challenging the ruling of the Ninth Circuit Court of Appeals in the *Cabazon* case. The *Cabazon* court reaffirmed the "civil-regulatory/criminal-prohibitory" analysis of Public Law 83-280 (18 U.S.C. § 1162 and 28 U.S.C. § 1360) (hereafter "Public Law 280") that was espoused in the earlier cases of *Barona Group of Capitan Grande Band v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); and *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (W.D. Wisc. 1981). This analysis is unjustified, inappropriate, and has pernicious effects which go far beyond the field of Indian gambling. The analysis has already been used in Minnesota in an attempt (ultimately rejected by the state supreme court) to challenge the applicability of the state's gun use laws in Indian country, and is readily available to cast confusion over

much of the state's authority to enforce traditionally "criminal" laws in Indian country. Carried to its logical conclusion, the civil-regulatory/criminal-prohibitory distinction could remove much of the criminal jurisdiction Congress thought it was granting the states when it passed Public Law 280.

The *Cabazon* court's use of the civil-regulatory/criminal-prohibitory framework cannot be allowed to stand without severe scrutiny. The Court now has an opportunity to re-examine that analysis, to re-examine some of its own *dicta* in *Bryan v. Itasca County*, 426 U.S. 373 (1976), and to straighten out the extreme interpretations given by some lower courts to its comments about Public Law 280 in the *Bryan* case.

Because of Minnesota's concern about the future effects of the *Cabazon* court's analysis of Public Law 280, this *amicus* brief will focus almost entirely on that aspect of the current appeal.

SUMMARY OF ARGUMENT

The *Cabazon* court rejected the argument that Public Law 280's grant of criminal jurisdiction (18 U.S.C. § 1162) gave California the authority to apply its bingo statutes to Indians in Indian country. In so doing, it adopted the so-called "civil-regulatory/criminal-prohibitory" test for interpreting Public Law 280. This test was most clearly articulated and applied to state bingo laws in *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982) and was subsequently followed in the cases of *Barona Group of Capitan Grande Band v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983), and *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (W.D. Wisc. 1981).

Minnesota urges this Court to reject the civil-regulatory/criminal-prohibitory test as set forth in *Butterworth* and adopted in *Cabazon*. The test should be rejected for three reasons.

First, the test is not grounded on an analysis of the wording or history of Public Law 280, and is not based on well-reasoned precedent. The *Butterworth* court did not engage in an independent analysis of Public Law 280, but merely borrowed the civil-regulatory/criminal-prohibitory language from an earlier case which interpreted, not Public Law 280, but the Assimilative Crimes Act. That earlier case was *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977). However, the *Marcyes* court had not created the test as a clear rule of law. In fact, the court initially rejected the test. It only used the civil-regulatory/criminal-prohibitory distinction for the sake of argument, deciding that even if the test were used, it did not help out the defendant in the case. *Butterworth* accepted the validity of the test without much question, apparently because the litigants argued the case to the court in that fashion. Neither *Butterworth* nor its successors seriously re-examined *Marcyes* or the foundation of the test.

The second reason for rejecting the test is that it violates long-held principles concerning the primary power of states to define what crimes and offenses are. *Rochin v. California*, 342 U.S. 165 (1952); *Knights of Pythias v. Meyer*, 265 U.S. 30 (1924). When it passed the criminal portion of Public Law 280, Congress knew that "offenses" and "crimes" were within the domain of states to define. Congress did not limit its grant of jurisdiction to "prohibitory" statutes; it allowed state jurisdiction over all crimes and offenses as the states define them. The *Cabazon* court improperly engrafted additional limitations to Public Law 280 which Congress did not express or imply.

The final reasons for rejecting the civil-regulatory/criminal-prohibitory test are that it is simplistic, unworkable, and overly susceptible to semantic ambiguities. Its use could turn many traditionally criminal statutes into civil-regulatory ones. There is no predictability to its use. Its adoption will cause substantial confusion and litigation.

Because of the legal and practical problems of the civil-regulatory/criminal-prohibitory test, this Court should adopt a new method for interpreting the grant of criminal jurisdiction in Public Law 280. The new method should consider the existence of criminal penalties for statutory violations, the state's own characterizations of its statutes, the location of the statute in the state laws, and appropriate declarations of the state legislature. The new test would implement congressional policy and preserve traditional principles of federalism. If a new test is adopted, *Cabazon* should be remanded for further analysis in light of this Court's holding.

ARGUMENT

I. THE CIVIL-REGULATORY/CRIMINAL-PROHIBITORY ANALYSIS OF *BUTTERWORTH* AND SUCCEEDING CASES IS NOT GROUNDED ON FIRM LEGAL FOUNDATIONS, VIOLATES LONG-HELD PRINCIPLES OF FEDERALISM, AND IS NOT WORKABLE.

The first section of the *Cabazon* opinion deals with the question of whether the criminal portion of Public Law 280 (18 U.S.C. § 1162) gave states jurisdiction over Indian-run bingo operations in Indian country. Citing the cases of *Barona Group of Capitan Grande Band v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983) and *Seminole Tribe v. Butterworth*, 658 F.2d (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982), the court concluded that Public Law 280's grant of criminal jurisdiction to California did not reach bingo operations. 783 F.2d at 901-903.

The conclusion of the *Cabazon* court was based on a so-called "civil-regulatory/criminal-prohibitory" test. Under that test, a law cannot be enforced by a state as a criminal law unless it completely prohibits a certain kind of conduct in its entirety. If a state law allows a certain activity—even though the activity may be strictly limited and regulated—the law must be considered to be "civil-regulatory" and falls outside the criminal jurisdiction granted by Public Law 280. The *Cabazon* court's reliance on this kind of test was in error. The civil-regulatory/criminal-prohibitory distinction used by that court must be re-examined and rejected.

A. Background and Summary of the Current Dispute Over Public Law 280.

The Public Law 280 issue raised by the *Cabazon* holding has its origins in some comments by this Court in the case of *Bryan v. Itasca County*, 426 U.S. 373 (1976). As the Court knows, Public Law 280 granted certain types of jurisdiction over Indians in Indian country to specified states. The grant of civil jurisdiction was codified in 28 U.S.C. § 1360; the grant of criminal jurisdiction was codified in 18 U.S.C. § 1162. The grant of criminal jurisdiction in 18 U.S.C. § 1162 is of primary importance in the current gambling disputes. That section reads in relevant part as follows:

> (a) Each of the States or Territories listed in the following table *shall have jurisdiction over offenses committed by or against Indians* in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, *and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:* . . . .

(Emphasis added.) In Public Law 280 jurisdictions, the initial inquiry in cases such as *Cabazon* usually is whether this grant of criminal jurisdiction allows the states to apply their bingo or other gambling laws to Indians.

Indian bands argue, and the *Cabazon* court agreed, that Public Law 280 criminal jurisdiction does not authorize enforcement of California bingo laws because those laws are "civil-regulatory" and not "criminal-prohibitory." This inter-

pretation of the criminal jurisdiction portion of Public Law 280 arises out of wording that appears in the Court's 1976 opinion in *Bryan v. Itasca County*, 426 U.S. 373 (1976). *Bryan* was a tax case that interpreted the *civil jurisdiction* provisions of Public Law 280.[1] Significantly, the case did not involve an interpretation of the grant of criminal jurisdiction contained in 18 U.S.C. § 1162.

The *Bryan* court held that Congress' grant of civil jurisdiction did not give Minnesota the power to tax personal property of Indians in Indian country. The *Bryan* court reasoned 1) that the major concern of Congress in passing Public Law 280 was with law and order problems on reservations;[2] 2) that the civil jurisdiction portion of the law was intended primarily to "redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians and other private citizens;"[3] 3) that in the legislative history of the bill, there was an absence of any reference to taxing authority;[4] and 4) that the civil portion of Public Law 280 was not intended to extend to Indians the "entire array of state non-criminal laws" such as the power to tax.[5] Without

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[1] The grant of civil jurisdiction, codified in 28 U.S.C. § 1360, reads in relevant part as follows:

> (a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory: . . . .

[2] 426 U.S. at 379-80.

[3] *Id.* at 383.

[4] *Id.* at 381.

[5] *Id.* at 384.

defining precisely what it meant by the phrase, the *Bryan* court opined that the civil section of Public Law 280 did not confer "general state civil regulatory control over Indian reservations."[6]

The ambiguities surrounding the *Bryan* wording soon escalated. In brief summary, a ninth circuit case (*United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977)) borrowed some of the *Bryan* language about Public Law 280 civil jurisdiction, and allowed it to be applied to a different federal criminal statute, the Assimilative Crimes Act (18 U.S.C. §§ 13 and 1152). Then the fifth circuit borrowed wording from the *Marcyes* opinion and allowed the *Marcyes* extrapolation of *Bryan* to be used to interpret the criminal portions of Public Law 280. *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982). The ninth circuit then adopted the *Butterworth* holding and applied it to California. *Barona Group of Capitan Grande Band v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983).

The result of the above cases is substantial confusion over what is meant by the term "criminal jurisdiction" as granted by Public Law 280, and what is meant by *Bryan's* reference to "general civil regulatory laws" such as the tax laws addressed in that opinion. As will be discussed in detail *infra*, Minnesota suggests that the process leading up to the *Cabazon* ruling was a haphazard one, and that the actual wording and intent of the criminal portion of Public Law 280 (18 U.S.C. § 1162) has been ignored.

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[6] *Id.*

B. The *Butterworth* Test Was Developed Without Adequate Analysis or Consideration.

The *Butterworth* case from the fifth circuit was the first federal case that analyzed Public Law 280 in terms of a distinction between state "criminal-prohibitory" laws and "civil-regulatory" laws. *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982). It was cited (without much re-examination) as the basis for the holding of succeeding federal cases such as *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (W.D. Wisc. 1981); *Barona Group of Capitan Grande Band v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983), and of course, *Cabazon*. Before this Court simply accepts the *Butterworth* distinctions, it should examine that case closely to see where they came from. Minnesota submits that the *Butterworth* test came about more by accident than design, and that it is not supported by the history of Public Law 280 or relevant long-standing Supreme Court precedent.

Although first applied to Public Law 280 in *Butterworth*, the civil-regulatory/criminal-prohibitory analysis did not originate with that case. Rather, both the district court and the court of appeals borrowed the distinction that was made between "civil" and "criminal" by the Court of Appeals for the Ninth Circuit in a case entitled *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977).

Marcyes was an Assimilative Crimes Act (18 U.S.C. § 13 and § 1152) case which dealt with the question of whether the State of Washington's fireworks control law could be enforced by the United States against Indians in Indian country. The court had to decide whether the state fireworks law was a criminal offense that could be prosecuted under the Assimilative Crimes Act. *Marcyes* held that the Washington

fireworks law was generally "prohibitory" in nature and considered it to be criminal:

> We conclude that Washington's fireworks law is a prohibitory rather than regulatory law. Even though the Washington scheme allows for limited exceptions, . . . its intent is to prohibit the general possession and/or sale of dangerous fireworks and is not primarily a licensing law.

557 F.2d at 1364. The *Butterworth* court seized on the "prohibitory" discussion of *Marcyes* and applied it to the criminal part of Public Law 280 and, ultimately, to bingo laws.[7] Succeeding cases relied on *Butterworth*.

Although the civil-regulatory/criminal-prohibitory analysis seems to be accepted today without question by many courts, it is certainly not deeply ingrained in the law. Its birth, as discussed, was in *Marcyes* in 1977. However, even its use in *Marcyes* may have been more accidental than intentional. In

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[7] One thing the *Butterworth* court did not do, however, was pay much attention to the *Marcyes* discussion of what characterized regulatory laws as distinguished from prohibitory laws allowing exceptions. *Marcyes* concluded that a main characteristic of regulatory laws (distinguishing them from prohibitory ones) was a revenue-raising purpose. Hunting license statutes were used as an example:

> The purpose of such [hunting and fishing license] statutes is to regulate the described conduct and to generate revenues. In contrast, the purpose of the fireworks laws is not to generate income, but rather to prohibit their general use and possession in a legitimate effort to promote the safety and health of all citizens.

557 F.2d at 1364. The courts that have considered bingo statutes have, without much comment, carried the analysis to much more extreme version: that a law which allows *any* activity must be considered a regulatory one.

that case it appears that the appellants, not the court, were most concerned about categorizing laws as "prohibitory."

> Their [appellants'] chief argument is that the ACA [Assimilative Crimes Act] only incorporates the general criminal code or prohibitory laws of a state and cannot be utilized to enforce the penal provisions of state regulatory laws such as Washington's fireworks laws.

557 F.2d at 1364. Then, in a conclusion the *Butterworth* court pointedly overlooked, *Marcyes* held that:

> A literal reading of the statute ("any act or omission") *would seem to indicate that the appellants' regulatory/prohibitory distinction is unavailing.*

557 F.2d at 1364 (emphasis added). The court further noted that "the extent and scope of the appellants' argument is misdirected." 557 F.2d at 1364.

At that point the *Marcyes* court did something which unfortunately haunts us to this day. *After rejecting its persuasiveness, the court accepted for the sake of argument* the appellants' use of the regulatory/prohibitory terminology. The court concluded that even if it used the appellants' proposed distinction, the case would still be decided against them:

> *Moreover, whatever persuasiveness appellants' argument may have is lost if the Washington statutory scheme is considered prohibitory rather than regulatory.* We conclude that Washington's fireworks law is a prohibitory rather than regulatory law. Even though the Washington scheme allows for limited exceptions . . . its intent is to prohibit the general possession and/or sale of dangerous fireworks *and is not primarily a licensing law.*

557 F.2d at 1364 (emphasis added). The court in *Marcyes* did not propose, advocate, or endorse the appellants' civil-regula-

tory/criminal-prohibitory analysis. It merely concluded that Washington's statute was criminal even under the appellants' own arguments.

In *Butterworth*, the Court of Appeals for the Fifth Circuit accepted the civil-regulatory/criminal-prohibitory language found in *Marcyes* without much comment or re-examination. That could be for either of two reasons. First, the court could have misread *Marcyes* and thought that the case was in fact setting forth a new rule as to what "criminal jurisdiction" entailed. The other, and perhaps more likely, possibility is simply that the parties to the *Butterworth* case presented the case to the court of appeals using that distinction:

> *All parties agree that the case turns on the determination of whether Florida Statute Section 849.093*—which permits bingo games to be played by certain qualified organizations subject to restrictions by the state—*is civil/regulatory or criminal/prohibitory in nature.*

658 F.2d at 311 (emphasis added). A review of the briefs submitted to the court of appeals in *Butterworth* will confirm that the bingo issue was presented to the court by the parties in terms of the civil-regulatory/criminal-prohibitory language.

Since the case was argued to the *Butterworth* court in that fashion, the court analyzed it that way without much further independent analysis. Certainly the cases referred to in *Butterworth* opinion had not established the civil-regulatory/criminal-prohibitory terminology as a significant part of the law.[8] Thus, the civil-regulatory/criminal-prohibitory rule for

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[8] *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975) did not even use the terms. The *Santa Rosa* case concerned the civil portion of Public Law 280 as it related to county zoning ordinances. The court held that such zoning ordinances

which *Butterworth* is cited by the Ninth Circuit Court of Appeals in *Barona* and *Cabazon* is not a well-considered long-standing rule at all. It had its basis in the rejected argument of a losing party in the *Marcyes* case, and was given further life by the agreement of two litigants in *Butterworth*. Minnesota urges this Court to recognize the confused and almost haphazard origin of the civil-regulatory/criminal-prohibitory framework. A fresh look should be given the grant of criminal jurisdiction under Public Law 280 as it applies to state laws such as gambling statutes. The civil-regulatory/criminal-prohibitory test should be rejected as unsupported by statutory language, adequate case law, or sound reasoning.

C. The *Butterworth* Test Is Not Grounded on the Wording or History of Public Law 280.

A serious shortcoming of *Butterworth* and succeeding cases is their lack of consideration of the actual wording of 18 U.S.C. § 1162, the statute they were interpreting. The phrase "prohibitory laws" appears nowhere in the statute. The concept of "crimes" being only violations of prohibitory laws appears nowhere in the legislative history of Public Law 280.

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could not be applied in Indian country, not because they were "civil-regulatory" laws, but because they were not civil laws *of the state*, and because such ordinances would encumber trust property in violation of 28 U.S.C. § 1360(b). *United States v. County of Humboldt*, 615 F.2d 1280 (9th Cir. 1980), also d' l not use the civil-regulatory/criminal-prohibitory terminology. The *Humboldt* case involved the same issue as *Santa Rosa*, and the court merely reaffirmed its previous ruling. *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), concerns an interpretation of the federal Organized Crime Control Act, and makes reference to "prohibitory" and "regulatory" laws only briefly at the end of its opinion, and only by way of citing *Marcyes*. *United States v. Marcyes*, the other case referred to in *Butterworth*, has already been discussed *supra*.

The plain wording of the statute indicates that all crimes or offenses fall within Public Law 280's grant of jurisdiction, not just violations of "prohibitory" statutes. As section "D", *infra*, discusses, the *Butterworth* rule inappropriately twists what should be a clear and complete grant of authority by the statute.

D. The *Butterworth* Test Violates Long-Held Legal Principles.

Not only is the *Butterworth* test unsupported by statutory language and viable case law, it also runs counter to long-held principles of federalism and statutory interpretation. A fundamental principle underlying this country's division of governmental authority is that the power to define crimes and offenses rests with the states. The only exception to this is when the federal government has defined federal crimes pursuant to its constitutional duties. As the Court held in *Rochin v. California*, 342 U.S. 165, 168 (1952):

> In our federal system the administration of criminal justice is predominantly committed to the care of the States. . . . Broadly speaking, *crimes in the United States are what the laws of the individual States make them*, subject to the limitations of Art. 1 § 10 [1], in the original constitution . . . and of the Thirteenth and Fourteenth Amendments.

(Emphasis added.) A later case expressed this in terms of "the vast domain of the criminal law that belongs exclusively to the States." *Knapp v. Schweitzer*, 357 U.S. 371, 376 (1958).

Within states, the power to define what is a criminal offense rests exclusively with the legislature. Typical of a long

line of cases in Minnesota and elsewhere is the wording of *State v. Bean*, 199 Minn. 16, 20, 270 N.W. 918 (1937):

> It is the exclusive province of the legislature to declare what acts deemed inimical to the public welfare shall constitute a crime, to prohibit the same, and impose appropriate punishment for a violation thereof. Judicial consideration of such enactments is limited to the inquiry whether the constitutional rights of the citizens are thereby violated or impaired.

When the issue of the construction of state statutes is raised in federal court, the federal judiciary should be bound by the construction given the statute by the highest *state* court:

> Under the settled rule of the court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the state, fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein.

Knights of Pythias v. Meyer, 265 U.S. 30, 33 (1924). *Accord Kingsley Corp. v. Regents of U. of N.Y.*, 360 U.S. 684, 688 (1959); *Beauharnais v. Illinois*, 343 U.S. 250, 253-54 (1952).

The above principles have long been recognized by both federal and state courts. They were a fundamental part of the law when Congress passed Public Law 280 in 1953.

Public Law 280 gave certain states such as Minnesota and California "jurisdiction over offenses" in Indian country and made "the criminal laws of such State" applicable in Indian country. In states such as Minnesota there is no difference among the terms "offense," "crime," and "criminal offense"—they are used interchangeably. *State v. Ketterer*, 248 Minn. 173, 79 N.W.2d 136 (1956). "Offenses" include any breach of law established for the general protection of the public

for which punishment by imprisonment may be imposed in a judicial proceeding. *Id.*; Minn. Stat. § 609.02, subd. 1 (1984).

Neither the wording of Public Law 280 nor its legislative history give any indication that Congress meant to alter or limit the fundamental and traditional power of states to define for themselves what crimes and offenses are. Neither the wording of Public Law 280 nor its legislative history make any mention whatsoever that only state "prohibitory" laws constitute the offenses referred to in the federal statute. Public Law 280 contains no indication that Congress—in the face of the traditional power of states to define crimes—was defining a special class of offenses which states would be limited to enforcing. Instead, Public Law 280 was "a general pronouncement that certain federal barriers to state jurisdiction have been eliminated." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, —— U.S. ——, 54 U.S.L.W. 4654, 4659 (U.S. June 17, 1986). It must be concluded that Congress allowed the states to enforce what the *states*, not Congress or the federal courts, define as criminal laws under state statutory schemes.

The circuit courts in *Butterworth*, *Barona*, and *Cabazon* ignored the traditional power of states to define crimes as well as the plain wording of Public Law 280. The courts' focus on the "criminal-prohibitory" category of law has no basis in Supreme Court precedent or in congressional enactment. The courts, on their own, engrafted major and far-reaching amendments onto 18 U.S.C. § 1162—something which even the canons of construction do not allow them to do.

In sum, the civil-regulatory/criminal-prohibitory test not only lacks reasoned court precedent, but it also violates long-standing precedent concerning basic principles of federalism

and statutory construction. When combined with the severe problems inherent in applying the test to specific situations (discussed in section "E" *infra*), ample reason exists to reject the test as an aid to interpreting Public Law 280.

E. The Practical Problems of Applying the *Butterworth* Test Make It An Unacceptable Rule.

The *Butterworth* approach to Public Law 280, as has been discussed, is not mandated by the wording of the statute and in fact violates relevant court precedent. Beyond that, the test is plagued with severe practical problems with regard to its application to varying fact situations.

The civil-regulatory/criminal-prohibitory test adopted by *Cabazon* is unacceptable because it is overly simplistic, too mechanical, and unnecessarily dependent upon semantics. For example, it is possible, depending on how one phrases the issue, to make many traditionally criminal laws fit into the "regulatory" category rather than the "criminal-prohibitory" one. Minnesota's narcotics laws could be considered to be civil-regulatory because narcotics are allowed to be possessed and sold under certain regulated circumstances or with certain licenses. Minn. Stat. ch. 152 (1984). Similarly, machine guns and other dangerous weapons may be possessed under certain circumstances (Minn. Stat. §§ 609.66-.67 (1984)); sexually provocative material may be possessed and disseminated under certain circumstances (Minn. Stat. §§ 617.291-.296 (1984)); fireworks may be possessed and sold under certain circumstances (Minn. Stat. §§ 624.20-.25 (1984)); and even the taking of human life is not "prohibited" under all circumstances (Minn. Stat. §§ 609.06-.065 (1984)).

Already, Minnesota has faced in the state supreme court a challenge to its handgun control laws based on the use of the

civil-regulatory/criminal-prohibitory distinction. In *State v. Folstrom*, 331 N.W.2d 231 (Minn. 1983), a White Earth Indian argued that a state statute prohibiting the possession of an uncased pistol in a motor vehicle or public area without a permit could not be used to justify his arrest for carrying a loaded .44 magnum pistol because carrying pistols was in fact allowed (albeit regulated) in certain circumstances with certain permits. After fully considering the *Butterworth* test, its history, and its problems, the Minnesota Supreme Court rejected it:

> The defendant invites us to adopt the criteria established by the federal court in the case of *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981). In that case the court classified statutes by determining whether they were "civil/regulatory" or "criminal/prohibitory." We decline to adopt this approach. Rather, we prefer a direct approach. Minn. Stat. § 624.714 (1982), is part of our criminal code. It defines possession of a pistol without a permit as a crime and provides criminal punishment. It is a criminal statute.

331 N.W.2d at 233.

The Oklahoma Supreme Court came to a similar conclusion about the *Butterworth* test:

> Some cases that discuss the issue of state regulation of bingo games try to distinguish between the "civil regulatory" or "criminal prohibitory" nature of bingo laws in order to determine whether the state may assume jurisdiction. We find the distinction unpersuasive because it provides no clear distinction between "regulatory" and "prohibitory" as applied to bingo. Most regulations may be interpreted as being in both categories.

State ex rel. May v. Seneca-Cayuga Tribe, 711 P.2d 77, 90 (Okla. 1985).

The above examples and observations demonstrate the morass into which the civil-regulatory/criminal-prohibitory dichotomy throws courts and litigants. All state laws are subject to debate.[9] Currently in Minnesota the debate over the *Butterworth* rule lives on in the context of video machine gambling, gambling on casino-type variations of bingo, teletrack horse betting, and pari-mutuel wagering over dog races or other contests. In the future, the focus in Minnesota and elsewhere will no doubt shift to other areas such as gun laws, traffic laws, and safety laws of all kinds. The rule of *Butterworth* and *Cabazon* concerning Public Law 280 jurisdiction simply causes more confusion than it resolves.[10] In light of both the legal and practical problems associated with the rule, it should be rejected.

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[9] The ambiguities of the test work both ways. With proper wording of the issue, even laws which courts have found to be civil-regulatory could be deemed to fall into a "prohibitory" category. The zoning laws in *Santa Rosa* could be said to "prohibit" the use of mobile homes as residences in certain areas. The bingo statute in *Butterworth* could be characterized as a prohibition against big stakes bingo for profit. Even the personal property tax laws in *Bryan* could be said to be prohibitions against owning certain types of property without paying taxes thereon.

[10] Even the *Butterworth* court itself acknowledged the difficulty in applying its test, calling the bingo issue "a close and difficult question" which was resolved only by resort to the canons of construction. 658 F.2d at 316. The imprecision of its test was acknowledged when the court conceded that "the regulatory bingo statute *may arguably be interpreted as prohibitory.*" *Id.* (emphasis added). The district court judge in *Oneida* also expressed some trepidation in following *Butterworth*: "I admit to a certain uneasiness in reaching that conclusion. Because it seems a rather mechanical approach to the issue presented, the analysis alone is not wholly satisfactory." 518 F. Supp. at 719.

II. A NEW APPROACH SHOULD BE ADOPTED TO ANALYZE THE EXTENT OF CRIMINAL JURISDICTION TRANSFERRED BY PUBLIC LAW 280.

Minnesota urges the Court to reject the simplistic civil-regulatory/criminal-prohibitory test embraced by *Butterworth*, *Barona*, and *Cabazon*. A new test should be adopted. This test should take into account the role of the state in creating and defining criminal offenses, the unambiguous wording of the criminal portion of Public Law 280 (18 U.S.C. § 1162), and various factors which can indicate whether a state law was intended to be a criminal one or merely a civil one concerned with licensing or regulatory control. The new test should focus on the question of whether a particular law was intended by a state legislature to be "criminal," not whether it was intended to be "prohibitory." Such an analysis would be much more consistent with past precedent and congressional intent than is the *Butterworth* rule. The following approach is suggested.

First, a court should look to whether violation of a state statute involves a criminal penalty. For example, the Minnesota Criminal Code defines a crime as conduct which is forbidden and for which the actor may be sentenced to imprisonment. Minn. Stat. § 609.02, subd. 1 (1984). Although not completely dispositive of the issue for reasons discussed in *Marcyes*,[11] 557 F.2d at 1364, this would be a powerful *prima facie* indication that a statute is a criminal one that can be enforced pursuant to Public Law 280. Similarly, the wording of the statute itself may show that the state legislature intended the law to be a criminal one.

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[11] *Marcyes* discussed the fear that an obviously civil regulation (e.g. a revenue-raising license scheme) could magically be made criminal by the attachment of a minor criminal penalty.

Second, the location of the law in the statute books may be of help. If the law in question is part of the criminal code, is in a section of the statutes dealing with crime, or appears among other clearly criminal statutes, there should be a presumption that it could be enforced under the grant of criminal jurisdiction from Congress in Public Law 280.

Third, the Court should analyze any state judicial precedents which interpret the statute and cast light on whether it has been treated as a criminal law for any state purposes. Judicial precedents should also be examined to determine if the purpose of the law is to control conduct recognized by the courts or statutes as being criminal in nature, *e.g.*, conduct which threatens the public safety, health, or morals. The focus should be on what the state legislature intended. *See, e.g., Osaka Shosen Line v. United States*, 300 U.S. 98, 101 (1937); *State v. Witt*, 245 N.W.2d 612 (Minn. 1976); *State v. Shevlin-Carpenter Co.*, 99 Minn. 158, 163, 108 N.W. 935 (1906).

When examining the above factors, the Court should keep in mind that Congress in Public Law 280 did not put any limitations on the definition of the terms "offenses" or "criminal laws of such state." It did not say that a law had to be "prohibitory" in order to be considered criminal. The presumption, based on the face of the federal statute, should be that if a state defines a certain statute as a criminal law for its own purposes, such statute should be enforceable under the criminal jurisdiction provisions of Public Law 280.

There is one final factor which should also be considered. If there is evidence that a state has enacted a criminal penalty provision in a statute, or renamed or recodified the statute, solely for the purpose of making a clearly civil-type law enforceable in Indian country, a court should examine such evidence closely. States should not be allowed to use such

subterfuge to make a civil law "criminal" when otherwise it would not have been so considered. If a court is alert for such situations, abuses of Public Law 280 need not occur.

If this Court were to adopt the above test in *Cabazon*, it would require a remand to examine the above factors. Such a remand would make it unnecessary for this Court to rule on the general issues of federal common law and inherent Indian sovereignty as they have been argued in the case. If California has been given jurisdiction to enforce its bingo laws pursuant to specific congressional enactment (Public Law 280), there is no need to examine any further jurisdictional issues. Therefore, Minnesota suggests a remand to consider the *Cabazon* case in light of new guidelines for interpreting the grant of criminal jurisdiction contained in Public Law 280.

Minnesota wishes to add one final note here in light of pending congressional gaming legislation (H.R. 1920, S. 2557, and S. 902) which, if passed, might affect some of the Cabazon Band's rights to operate gaming activities in Indian country. The *Cabazon* appeal should be considered regardless of the actions of Congress. Congressional legislation may not apply to the *Cabazon* situation at all, or a least not for a period of time. If such legislation were to have a "grandfather clause," allowing continuation of activities currently deemed to be legal, the *Cabazon* issues will still remain. Regardless of congressional action, a determination of the legitimacy of the civil-regulatory/criminal-prohibitory test would still be crucial to California, and certainly critical to other states. If left alone without comment, *Cabazon* will be relied on as precedent for the civil-regulatory/criminal-prohibitory test. To allow such precedent to remain would be a disservice to lower courts, states, and all others caught up in the confusion caused by that test. If congressional legislation

does pass, this Court could remand the *Cabazon* case for reanalysis in light both of its holding with regard to the *Butterworth* test and the applicability of the federal legislation.

CONCLUSION

For all the reasons discussed in this brief, the State of Minnesota urges this Court to 1) reject *Cabazon's* civil-regulatory/criminal-prohibitory test for interpreting Public Law 280's grant of criminal jurisdiction, 2) adopt a new test consistent with the suggestions contained in this brief, and 3) remand the *Cabazon* case for consideration in light of the new test.

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Respectfully submitted,

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